

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PATRICIA WOLFE,

Plaintiff,

v.

FAIRBANKS CAPITAL CORPORATION,

Defendant.

2004 CIVIL ACTION No. 04-10762-DPW

MOTION TO REMAND

Pursuant to 28 U.S.C. § 1447(c), defendant Fairbanks Capital Corporation ("Fairbanks") hereby moves to remand this action to the 362nd District Court of Denton County, Texas. As grounds for this Motion, Fairbanks states as follows:

1. On or about April 1, 2002, Plaintiff Patricia Wolfe ("Wolfe") filed suit against Fairbanks in the 362nd District Court of Denton County, Texas (the "State Court Action"), claiming that Fairbanks misapplied her monthly mortgage payments.
2. The Denton County Court entered summary judgment in favor of Fairbanks, and the Texas Court of Civil Appeals affirmed the judgment on February 5, 2004. See Wolfe v. Fairbanks Capital Corp., 2004 WL 221212 (Tex. App. Ct. Feb. 5, 2004). The Court of Civil Appeals' mandate issued on April 9, 2004.
3. On April 9, 2004, Wolfe filed a Notice of Removal of the State Court Action to this Court, asserting that her lawsuit "arises under the Constitution and the laws of the United States." Notice of Removal at 2. Removal was improper for several reasons.
4. The removal is procedurally defective. First, Wolfe is not entitled to remove. The removal statute only allows *the defendant* in a state court action to remove that action to

federal court. See 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the District Courts of the United States have jurisdiction, may be removed by the defendant”).

Wolfe was the plaintiff in the State Court Action, and so she cannot remove it.

5. Second, Plaintiff removed to the wrong court. The removal statute provides that a party must remove a case “to the district court of the United States for the District and Division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Plaintiff should have removed the case to the United States District Court for the Eastern District of Texas (Sherman Division), if anywhere, not this Court.

7. Third, Wolfe’s removal also is untimely. Assuming she could remove, Plaintiff failed to do so within the time periods provided by 28 U.S.C. § 1446(b).

8. Wolfe also has no substantive ground to remove. Federal question jurisdiction does not exist, because Wolfe asserted only causes of action arising under Texas state law against Fairbanks in the State Court Action and did not assert any federal claims.

9. This Motion is timely filed, to the extent it challenges defects of removal procedure, as it is filed within 30 days after the filing of Plaintiff’s Notice of Removal. See 28 U.S.C. § 1447(c).

Fairbanks has filed a Memorandum of Law contemporaneously with this Motion. A proposed Order is also attached.

WHEREFORE, defendant Fairbanks Capital Corp. respectfully requests that this Court grant its Motion to Remand and remand this action to the 362nd District Court of Denton County, Texas.

Respectfully submitted,



Brooks R. Brown (BBO #653608)
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

Thomas M. Hefferon (BBO #548289)
GOODWIN PROCTER LLP
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 974-1000

Attorneys for Defendant
Fairbanks Capital Corp.

Dated: May 7, 2004

CERTIFICATE OF SERVICE

I, Brooks R. Brown, do hereby certify under the penalties of perjury, that on May 7, 2004, I arranged for the service by U.S. Mail, postage prepaid, a copy of the foregoing on the following counsel of record:

Frank P. Hernandez
716 Wayne
Dallas, Texas 75223


Brooks R. Brown

LBW/1100697.2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PATRICIA WOLFE,

Plaintiff,

v.

FAIRBANKS CAPITAL CORPORATION,

Defendant.

Civil Action No. 04-10762-DPW

ORDER GRANTING MOTION TO REMAND

On consideration of the Motion to Remand filed by Defendant Fairbanks Capital Corp., the Opposition submitted by Plaintiff Patricia Wolfe ("Plaintiff"), and the entire record herein, and finding that good cause exists, it is

ORDERED that the Motion be and it hereby is GRANTED; and it is

FURTHER ORDERED that this case be and it hereby is REMANDED to the 362nd District Court of Denton County, Texas.

Hon. Douglas P. Woodlock
United States District Judge

Dated: May ___, 2004

SERVE:

Frank P. Hernandez
716 Wayne
Dallas, Texas 75223

Attorney for Plaintiff

Brooks R. Brown, Esq.
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Thomas M. Hefferon, Esq.
GOODWIN PROCTER LLP
1717 Pennsylvania Ave., N.W.
Washington, DC 20006

Attorneys for Defendant Fairbanks Capital Corp.

LIBW/1100705.1